IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NSTON BRYANT McCONNEY,

Appellant,

v.

TED STATES OF AMERICA,

Appellee.

NO. 22722

BRIEF OF THE APPELLEE

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SUBJECT INDEX

TABLE OF AUTHORITIES

Page

Cases (Cont.)

Statutes

Other Authority

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WINSTON BRYANT McCONNEY, Appellant, v. UNITED STATES OF AMERICA, Appellee.	NO. 22722

BRIEF OF THE APPELLEE

I

ISSUES PRESENTED FOR REVIEW

Appellant presents four issues for review. They may properly be stated as follows:

1. Did the District Court commit reversible error by abusing its discretion in denying appellant's motion for another continuance, made on the morning of trial and based upon the previously known absence of an informant, in light of the Government's compliance with the appellant's request for his presence and with the terms of the Court's orders with respect to same and the Court's admitting into evidence the hearsay statement of the allegedly desired witness which

consisted of the testimony appellant hoped to have him give?

2. Did the District Court commit reversible error by the questions it asked the witnesses?

3. Did the District Court commit error in admitting into evidence a statement made by appellant's co-defendant in the course of committing the crime charged and/or testimony of a statement made by the informant offered and admitted solely to impeach his hearsay statement offered by appellant and admitted into evidence?

4. Does Title 26, United States Code, Section 4705(a) violate the Fifth Amendment privilege against self-incrimination?

II

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition:

On November 16, 1966, appellant and Paul McAlee were jointly indicted for violation of 26 U.S.C. 4705(a) (unlawful sale of heroin). Appellant became a fugitive[1/] (R.T. 190:15-16; 5:18-20) and accordingly, McAlee was tried separately by a jury and convicted on January 13, 1967. Appellant's first jury trial commenced on July 24, 1967. A mistrial was declared the following day due to a juror's disability. The next day the case was set for trial October 9, 1967. On that date the trial was continued to October 16, 1967, and on that date continued again for trial to October 23, 1967, when the second jury trial commenced and the defendant was found guilty the following day. On November 14, 1967, he was sentenced to the minimum term for his violation of said statute.[2/] He has been at liberty on bond pending this appeal.

1/ Reporter's Transcript (R.T.) 190:15-16; 5:18-20.

2/ 26 U.S.C. 7237(a) provides for a minimum mandatory term of five years in prison. Appellant was also fined $1.00.

Statement of Facts:[3/]

On October 14, 1967, in Berkeley, California, a Federal Bureau of Narcotics Agent, Stephen Chesley, acting undercover, went to the apartment of Mr. Jesse Coy, a Government informant, where he met and conferred with Mr. Coy in the living room (R.T. 37:10 - 41:11). The appellant and Paul McAlee were already in the bathroom. McAlee exited the bathroom, entered a hallway leading to the living room, appeared there, stated to the Agent and Mr. Coy, "We are ready, get the money." and returned to the bathroom (R.T. 41:15 - 42:21; 44:2-9; 66:1-11). The Agent then transferred $450.00 of official funds to Mr. Coy and they both proceeded to the bathroom (R.T. 44:12-24) about twenty-five feet away (R.T. 45:13-21; 46:22 to 47:3) where Chesley found the bathroom door open (R.T. 45:22-24). He stood on the threshold of the bathroom directly behind Mr. Coy and observed appellant standing by the toilet and McAlee seated to the right on the bathtub (R.T. 51:15 - 53:8). Appellant said, "There it is." (R.T. 53:9-13) On a chair in the bathroom facing the

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3/ The facts on appeal are viewed in the light most favorable to the Government. Miller and Joseph v. United States, 382 F.2d 583 (9th Cir. 1967).

appellant, its back to McAlee, was a quantity of a white powdery substance resting on a paper tablet (R.T. 53:22 - 54:10). Mr. Coy started to hand the money to McAlee but appellant snatched it out of both of their hands and proceeded to count it (R.T. 55:5-25). Mr. Coy then retrieved the powder and turned around giving it to the Agent (R.T. 56:20-21). Appellant, followed by McAlee, then exited the bathroom, appellant stating that he would meet the Agent later (R.T. 57:2-20). The white powder was subsequently chemically analyzed and found to be heroin (R.T. 17:22 - 31:12; 62:12-23). No official order form was transferred or displayed by or to any of the parties to this transaction (R.T. 62:4-11).

At McAlee's trial in mid-January, 1967, the Government had Mr. Coy present for call as a witness and he testified (R.T. 158:19 to 159:7; 170:12 to 172:11).

In early March, 1967, approximately two weeks after he plead not guilty, the appellant, in company of some of his friends, met Mr. Coy on a street corner in Berkeley and told Coy that he wanted him to go to the appellant's lawyer's office and give a statement that Agent Chesley was not in the bathroom and did not

see the alleged transaction (R.T. 201:5-14). Mr. Coy went to the office, and, with appellant waiting outside in the reception room (R.T. 124:8-11; 198:17-25), was tape-recorded by appellant's attorneys (R.T. 111:18 to 112:20). They elicited from him the statement appellant McConney had asked for (R.T. 117:14 - 118:15). They did not ask what Mr. Coy himself had observed in the bathroom (R.T. 132:5-17; 159:8 to 169:3).

On April 25, 1967, trial date was set for July 25,1967. Four days prior to trial appellant's attorney attempted to have their private investigator serve a subpoena on Mr. Coy who refused service (Op. Br. App. A-2, ll. 5-6). The Assistant United States Attorney assigned to try the case was contacted by appellant's trial counsel and, by mutual agreement, first attempted to serve Mr. Coy with a subpoena, which he refused (Op. Br. App. A-2, ll. 19-24, 28-29), and then had Mr. Coy arrested by federal agents as a material witness on a warrant authorized by the Government and filed the next day (Op. Br. App. B-1 and B-2). At the July 24, 1967 trial, Mr. Coy appeared at liberty on bail and available for testimony as a defense witness (Op. Br. p. 2, l. 20 to p. 4, l. 5). When a mistrial,

due to a juror's disqualification (Op. Br. App. C, par. 2), was declared, the trial judge ordered that Mr. Coy remain at liberty on the bail previously set, directed him to appear at 8:00 A.M. at the Berkeley Police Department on the morning of the next trial date, which was to be set, pursuant to notification to him by the Government of the new trial date. No objection to this procedure was made by appellant's counsel (Ibid).

The next day, trial was set for October 9, 1967. On October 2, 1967, Mr. Coy telephoned and was advised of the October 9 trial date and stated that he would present himself as directed. He failed to appear on that date (R.T. 4:5-7) and a warrant for his arrest was issued (Op. Br. App. A-3, ll. 7-8). Accordingly, the case was continued to October 16, 1967 and then on that date, again to October 23, 1967.

On October 23, 1967, the morning of trial, while the jury panel was waiting, appellant's trial counsel requested another continuance on the ground that Mr. Coy still could not be found (R.T. 2:14-16). Appellant's trial counsel stated that it took over a month to find Mr. Coy for the last trial and did not allege any factual basis for leads as to finding Mr. Coy

except that "he continually returns to Berkeley and can be found there when he is there" (R.T. 3:6-8). The Government, through the Berkeley Police Department, had been trying to locate the witness but had developed no leads to indicate where he was (R.T. 4:4-9).

The Court found that there was no reasonable prospect that a third continuance would assure the location of Mr. Coy, that it had been almost a year since indictment and ten months since arraignment and accordingly denied the request for another continuance (R.T. 5:18-24; 6:25 to 7:5). However, in denying the motion for another continuance, the Court ruled that, in the absence of Mr. Coy, it would allow the appellant's trial counsel to introduce as affirmative evidence in his case the out-of-court tape-recorded statement they elicited from Mr. Coy (R.T. 6:9-24). The Government stated that it had no objection to this statement being so introduced into evidence by the defendant (R.T. 4:9-17). The defendant's theory supporting its admissibility was that it was a statement made against "penal interest" (possible perjury) (R.T. 100:9-10). The trial court, "in the interest of justice" (R.T. 99:18) and "to resolve the doubt in favor of the accused" (R.T. 101:1-2), admitted into evidence the

portion of the statement offered by the defendant into evidence (R.T. 102:4 to 103:12), although appellant's trial counsel had not had a transcript of the sworn testimony, with which the tape-recorded statement allegedly conflicted prepared, until almost a month after he had elicited the statement from him (R.T. 100:16-17) and accordingly was never shown to Mr. Coy prior to or at the time of his March 2, 1967 statement nor was his attention ever directed to his previous sworn testimony (R.T. 131:8-23; 132:18-24). Ultimately, the Government suggested and moved for admission into evidence of the entire statement, which was done (R.T. 133:21).

III

ARGUMENT

I

We have undertaken a detailed statement of the facts solely with respect to appellant's first specification of error since we believe that appellant's statement does not accurately state those facts. We submit that the trial court did not abuse its discretion in denying appellant's request for a further continuance in view of the following facts: the very limited nature and scope of the testimony the appellant was hopeful of eliciting from Mr. Coy; there was another readily

available witness who the defense made no effort whatsoever to call; counsel's motion for yet another continuance was not made in a context of his being surprised by Mr. Coy's non-appearance; there was no reasonable prospect of securing his attendance in the proximate future; the Government was not at fault for his non-appearance and had made a reasonable effort to locate him. Further, it is submitted that the trial judge's liberal ruling admitting the absent out-of-court statement into evidence amply protected defendant's rights.

1. At the outset, it must be observed that the scope of the testimony which appellant's trial counsel was hopeful of eliciting from Mr. Coy was virtually myopic: that Agent Chesley did not assume a vantage point from which he could see what appellant did in the bathroom with the heroin. It pointedly avoided any reference to the operative facts of the alleged transaction, i.e., what Mr. Coy may have himself seen and heard appellant do there where the illicit sale took place. The proposed testimony of the absent witness did not bear in any sense upon entrapment, no claim of entrapment was ever made by the appellant nor do any facts appear in the record suggesting same. Moreover,

on the narrow issue of the agent's vantage point, defense counsel never made any motion for the production of a second witness to the transaction other than Mr. Coy, who was readily available and who had observed all that took place: Paul McAlee, the already convicted co-defendant. The Government had issued a writ of habeas corpus ad testificandum for McAlee for the July 25, 1967 trial. No motion was ever made by defense counsel for his production on this or any other such writ.

2. It is apparent from defendant's trial counsel's affidavit (Op. Br. App. A-3), prepared four days prior to trial to support his motion for another continuance, that he knew that Mr. Coy had failed to appear for trial on October 9, 1967, two weeks previously (Ibid, 6-7), and accordingly could not have been genuinely surprised by his non-appearance on the morning of October 23, 1967, when, with the jury panel waiting, he made his motion for a further continuance.

3. Appellant states that his trial counsel represented that Mr. Coy could be found within thirty days (Op. Br. ix:14). To the contrary, no time was avered and no factual basis was alleged by his counsel to indicate that there was even such a probability.

Trial counsel simply admitted that "it took over a month to find him last time" (for the July 25, 1967 jury trial) (R.T. 3:1-3).

4. Appellant asserts that the failure of appearance of the witness was the fault of the prosecution (Op. Br. 5:12-13), attributable to its negligence (Op. Br. 7:17-18) and that the Government hindered the defendant's efforts to locate him (Op. Br. 7:25).

It is "abundantly clear that the Government is not the guarantor of a special employee's appearance at trial." United States v. White, 324 F.2d 814 (2nd Cir. 1963). Additionally, this record establishes that the Government amply met its burden of a "good faith reasonable effort" (Tapia-Corona v. United States, 369 F.2d 366 (9th Cir. 1966)) to have the witness present. The record demonstrates that the Government never attempted to conceal the witness, and amply complied with both the appellant's requests for him and the Court's orders for his attendance.

At defendant McAlee's trial, the Government produced Mr. Coy for call as a witness and he testified fully as to the details of the heroin sale.

In late July, 1967, preparatory to appellant's

first trial when the appellant was unable to serve him with a subpoena, the Government complied with appellant's request to serve its own subpoena, and when that failed, in circumstances which indicated that the witness was being recalcitrant to both parties, the Government again, by agreement with appellant's counsel, authorized and filed a material witness warrant against him, had him arrested and had him present in Court on July 25, 1967 for testimony. When this trial was aborted by a mistrial for a reason wholly independent of Mr. Coy, the Court ordered Mr. Coy to continue on his bail and, for his convenience, to report for the next trial to the Berkeley Police Department. To this, defendant's counsel made no objection. When Mr. Coy contacted the Government on October 2, 1967, they advised him of the October 9, 1967 trial date and he stated he would be there. When he failed to appear, a new warrant was authorized. Between October 9 and October 23, 1967, the Berkeley Police Department, being the agency to which the Court had directed the witness to report, the general police agency of defendant's residence[4/], the agency which had participated in

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4/ Coy resided in Berkeley at the time of the offense. (R.T. 161:2-4) On March 1 and 2, 1967, he was found there by appellant. According to appellant's trial counsel as of July 20, 1967, Mr. Coy was staying in an apartment in Berkeley (Op. Br. App. A-2, l. 5) and as of October 23, 1967, "he continually returns to Berkeley and he can be

successfully effecting his arrest on the July, 1967 material witness warrant, an agency which knew of his activities as an informant[5/], in cooperation with federal authorities, had searched for him and was unable to locate him or develop any leads as to his whereabouts.

The cases cited by appellant are inapposite on their facts. They involve denials of motions for continuance where the witnesses' whereabouts were known, Scott v. United States, 263 F.2d 398, 401 (5th Cir. 1959); Younge v. United States, 223 F. 941 (4th Cir. 1915), cert. den. 245 U.S. 656 (1917), and/or where the defendant was given only one day's notice to prepare for trial and subpoena his witnesses, Paoni v. United States, 281 F. 801 (3rd Cir. 1922), or requested a continuance of only several hours for same, United States v. Pate, 345 F.2d 691, 694 (2nd Cir. 1965).

The facts of the instant case stand in stark contrast to those of Velarde-Villarreal v. United States,

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5/ According to appellant's own trial counsel, Officer Barons of the Berkeley Police Department apparently was fully acquainted with Mr. Coy's actions as an informant (R.T. 178:5-17; 179:15-21).

354 F.2d 9 (9th Cir. 1965), not cited by appellant. There, the appellant made out a strong claim of having been entraped by the missing informant, the record showed that the Government never even attempted to advise the informant of the trial although it was in periodic contact with him after the offense and the record indicated that the Government may have purposely made the informant unavailable for trial by sending him out of the country.

5. The appellant attempts to emasculate the force and effect of the Court's admitting into evidence Mr. Coy's out-of-court statement, which comprised the precise testimony the defendant desired and expected from the witness, by stating in his Brief that the Court limited its evidentiary application to simply impeachment of Mr. Coy's testimony given in the earlier trial of co-defendant McAlee (Op. Br. x:1-6). This is not true. The Government agreed that the portion of the statement desired by defendant's counsel could be introduced by the defendant as affirmative evidence in his case to impeach Agent Chesley, that is, have the same force and effect as if Mr. Coy was present at trial and testified in exact accordance with the statement. When the defendant later offered the entire statement into evidence, the Government agreed

to admit the balance of the statement as its own evidence, which was done.

The defendant's theory of admissibility was that the statement might fall within the "statement against penal interest" exception to the hearsay rule. It is noteworthy that no known federal case has ever permitted such an exception. The Supreme Court in Donelly v. United States, 228 U.S. 243, 272-277 (1912), and this Court in Jeffries v. United States, 215 F.2d 225, 226 (9th Cir. 1954), have held such statements inadmissible in evidence. The weight of authority is against their admissibility. Jones v. United States, 400 F.2d 134, 136 (9th Cir. 1968). Even if analogized to statements against proprietary or pecuniary interest, the circumstances under which the statement was procured by appellant, as well as the fact that it was not self-evident or apparent that the witness was aware that it was against his penal interest (alleged perjury) since no reference was made to his prior testimony when he gave the taped statement, these circumstances would have fully justified its exclusion as not having been made in trustworthy circumstances. (See, 5 Wigmore § 1457, p. 263, 1964 Supp., pp. 64-65.)

Finally, appellant asserts that the absence of

Mr. Coy precluded, since the necessary foundation could not therefore be laid, proof that Mr. Coy was independently dealing, without the knowledge of law enforcement, in non-narcotic drugs. It is submitted that this evidence would have been inadmissible, as irrelevent, immaterial and improper impeachment even if Mr. Coy had personally testified at the trial. The purpose of this proof, according to appellant's trial counsel, was to show "inferentially" that Mr. Coy participated in the instant sale of heroin as an informant so that the attention of law enforcement would be diverted from him as a dealer (R.T. 176:21 to 177:16), yet defense counsel made no claim of entrapment and the defendant's testimony belies any such claim and further disavowed any claim that the heroin was supplied by Mr. Coy (R.T. 176:21-22) and thus that he committed the crime. Accordingly, the evidence was irrelevant and immaterial. Alternatively, it was offered as impeachment of Mr. Coy's statements in evidence (R.T. 180:2-9). But the offer of proof consisted solely of alleged acts of misconduct not resulting in conviction which are not the subject of impeachment.

In any event, the purported proof was directed to wholly collateral and tangential issues, and its probative value rested upon a series of inferences so attentuated that the Court was fully justified in excluding it.

The discretion of a trial court in denying motions for continuances will not be reviewed on appeal absent clear abuse of that discretion. Lemons v. United States, 337 F.2d 619, 620 (9th Cir. 1967). It is submitted that the trial court's ruling here, denying a motion, made on the morning of trial, in a case which was approaching its anniversary, with no reasonable prospect of securing the attendance of the witness in the proximate future, when his expected testimony only concerned the vantage point of one of the Government's witnesses, in a context which belies any negligence or collusion by the Government with respect to the absence of the witness, when there was another witness available to the defendant who observed the pertinent matters and the defendant made no effort whatsoever to call him, and where the Court permitted the introduction into evidence of the witness' out-of-court statement which comprised the precise testimony the defendant wished to produce from the witness if present, was entirely proper and the appellant was not prejudiced thereby.

II

Appellant asserts as error the trial judge's asking questions of the witnesses and, more particularly, alleges that the Court "took over" the cross-examination of appellant (Op. Br. xii:10-11) and demonstrated a clear partiality to the prosecution (Ibid, 11-12).

The record discloses that the overwhelming majority of the Court's questions were directed solely to foundational and preliminary matters. The record also discloses that, contrary to the appellant's statement (Op. Br. 12:17-18), no objection was ever made by appellant's trial counsel to any of the questions. The Court's overall conduct of the trial and the vigorous assertion by appellant's trial counsel of his various motions to the Court belies any contention that counsel was intimidated from making any objection to the Court's questions. The record does not support appellant's contention that the Court showed any partiality to the prosecution. For example, the Court questioned the Government percipient witness, Agent Chesley, as follows concerning payments to Mr. Coy:

"THE COURT: Your answer is you don't know or that he was not paid?

"THE WITNESS: He was not paid.

"MR. WELLS: Q. He was paid on what basis, then?

"A. On the basis of expenses incurred.

"Q. You took his word for the expenses, is that it?

"A. He had a telephone bill.

"THE COURT: Did you additionally pay him any daily pay? Did he ever get $5.00 or $10.00 a day or was he paid for his time?

"THE WITNESS: No, sir.

"THE COURT: So you say the only pay he received was for expenses incurred by him?

"THE WITNESS: Expenses incurred and there would probably be a little bit more, but as far as actual pay, by paying him $5.00 or $10.00 a day, no, it was just --

"THE COURT: Then will you explain to us what you mean by getting a little more?

"THE WITNESS: Well, if his expenses came to, say, $5.00 for telephone calls he would probably get $10.00.

"THE COURT: All right. In other words, you sweetened his expenses.

"THE WITNESS: I would say yes, sir." (R.T. 75:23 to 76:20) (Emphasis added.)

In addition to the instruction quoted by the appellant (Op. Br. 19:8-14) (the record fails to disclose that the Judge ever made any comments on the evidence), the Court's instructions were virtually riddled with admonitions and directives to the jury

that the facts, the evidence, its weight and the witnesses' credibility were solely for them to determine:

1. "You are the sole judges of the facts." (R.T. 214:12-13)

2. "I must not and do not trespass upon your duty, the duty of determining the facts and the credibility of the witnesses." (R.T. 214:16-18).

3. "You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves." (R.T. 223:1-2)

4. "The jurors are the sole judges of the credibility of all the witnesses and the weight and effect of all the evidence." (R.T. 231:23-25).

Just as none of the questions by the Court were never objected to by the defense, neither were any of the instructions applicable thereto.

It is submitted that the record wholly fails to disclose that the Court's questioning of any witness, in light of the nature of questions asked, their equal application to Government and defendant, the brevity of the Court's questions addressed to the defendant

which went solely to developing details of two matters already elicited through trial counsel's questioning and the instructions in the case as taken as a whole, that the jury could have reasonably been influenced thereby in the rendering of their verdict.

III

Appellant next asserts as error the admission into evidence of co-defendant McAlee's statement made from the hallway which ran from the bathroom, where the appellant was, to the living room, where the Agent and Mr. Coy were.

The statment was, "We are ready, get the money." (R.T. 66:1-11) This statement, even if it could conceivably be held to be inadmissible hearsay, was hardly damaging to appellant's case. His own testimony was that he was present at the sale, that he was there merely to collect a debt owed to him by McAlee and, in effect, that McAlee had told him to come to the apartment to collect the money since McAlee had a deal going (R.T. 181:19 to 185:1). Accordingly, McAlee's above quoted statement did not seriously impugn the appellant's claimed defense.

But it is submitted that a detailed and ample foundation was laid to support its admissibility as both an adoptive admission and as a statement of an agent.

As an adoptive admission, an ample foundation was made in the record to show that the statement was made in the presence of the appellant. When Agent Chesley initially entered the apartment, the bathroom door, which was immediately to the left of the entrance (R.T. 70:5-8), was closed (Ibid, 20-24). Chesley, seated in the living room, heard from the direction of the bathroom, about twenty feet away, a door open, did not hear it close again, whereupon McAlee immediately appeared in the hallway entrance to the living room (R.T. 72:5-8; 41:15 - 42:20) and stated, "We are ready, get the money.", thereupon returning in the direction of the bathroom. When Chesley proceeded to the bathroom, the bathroom door was open (R.T. 45:22-24), the appellant and McAlee inside (R.T. 46:3-6). Accordingly, a sufficient foundation was laid to support the admissibility of the statement as having been made in the presence of appellant McConney.

Again the statement was admissible as one by an agent, i.e., by McAlee as an agent of the appellant. Here again an ample foundation was laid. Each fact set forth in our statement of facts was proved prior to the statement being offered before the jury. In addition, it was shown that after the appellant said, in the bathroom, "There it is.", the heroin being then on the

seat of a chair which was facing him, Mr. Coy said, "Where?", and McAlee responded, "Right there.", motioning to the chair (R.T. 53:16-22), whereupon he vouched for its quality (R.T. 54:11-17). The Court made a specific finding that there was a sufficient showing of concert of act to justify the admissibility of the statement against the appellant (R.T. 60:12-16). It is submitted that this finding comported precisely with the applicable standard for the admissibility of such statements:

> The test is not whether the defendant's connection had by independent evidence been proved beyond a reasonable doubt but whether, accepting the independent evidence as credible, the judge is satisfied that a prima facia case (one which would support a finding) has been made. Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963), cert. den. 365 U.S. 861, reh. den. 376 U.S. 901.

Appellant next asserts as error the admission into evidence of Agent Chesley's testimony that Mr. Coy told him on July 25, 1967, that Coy had lied in his statement to appellant's attorneys. We submit that its admission into evidence was proper.

Once a declarant's out-of-court statement has been admitted into evidence for the truth of the matters asserted therein under an exception to the hearsay rule, that hearsay statement may be impeached by a subsequent hearsay statement by the declarant inconsistent with it.

Before the turn of the century, there was the rule announced for the federal courts. Carver v. United States, 164 U.S. 694, 697-698 (1897) [dying declaration offered by one party and admitted into evidence held: reversible error to exclude from evidence inconsistent hearsay statements by declarant offered to impeach his hearsay statement.] It has been the law in California for over twenty years. People v. Collup, 27 Cal.2d 829, 836-837, 167 P.2d 714 (Cal. Supp. Ct. 1946) [former statement of absent witness offered by one party and admitted into evidence, held: reversible error to exclude other hearsay statement made subsequently and offered for impeachment]; Am.Cal. Investment Co. v. Sharlyn Estates, Inc., 255 Cal.2d 526, 542, 63 Cal. Rptr. 518 (1967) [same]. The rule is supported by overwhelming authority. 3 Wigmore, Section 1033, p. 716, ftn. 1; p. 718, ftn. 3 (see cases cited). Wigmore himself endorses the rule (Ibid, accompanying text). The rationale and policy underpinnings of the rule as ellucidated by the aforementioned authorities, are sound: Where the hearsay statement initially admitted into evidence was made in circumstances which did not permit cross-examination by the opponent, and is offered for the truth of the matters asserted

therein, the usual foundation requirement that the declarant be available to explain the inconsistency is dispensed with, as otherwise the hearsay statement would be virtually immunized from attack, as no other such evidence is, by precluding the introduction into evidence of the most probative evidence impeaching it: that at some other time the declarant made another statement inconsistent with it and/or admitting its falsehood.

As the trial judge instructed the jury, the sole purpose for which the second statement in the instant case was admitted was for impeachment, and he instructed them that was the sole purpose for which they could consider it (R.T. 208:4-11, 24-25). The trial court's instructions to the jury to disregard the stricken testimony concerning circumstances surrounding the impeachment were ample and clear (R.T. 211:13-23; 218:22-23).

Appellant cannot now be heard to complain of the repeated instructions since he himself asked for them (R.T. 211:13-24).

IV

26 U.S.C. 4705(a) is not unconstitutional as violating a Fifth Amendment privilege against self-incrimination.

We quote from our Supplemental Memorandum filed before this Court in Clinton Johnson v. United States, No. 22,258 (under submission).

> The statute in question makes no informational demands upon the appellant or others similarly situated, and it is clear that the present prosecution is not related to any failure to provide information. The registration and taxation provisions of the Act exempt anyone who cannot demonstrate that his activities are in full compliance with local and Federal law, and accordingly the required information cannot be classified as creating real and appreciable hazards of criminal prosecution.
>
> An illegal transfer of narcotic drugs in violation of 26 USC §4705(a) is not based upon the appellant's failure to fulfill a statutory requirement to provide information.[1]
>
> The proscribed act is the transfer of narcotic drugs to a person who has not demonstrated his lawful right to possession by providing a written order form to the seller. It is the purchaser and not the seller who is required to provide information to secure the order form.[2] Since 26 USC §4705(a) imposes no informational requirement upon a transferor in the appellant's position, there can be no possibility of self-incrimination.

1/ It is the recipient of the narcotic drugs who is required to register and pay the special tax. 26 USC §4705(a) and 4705(f).

2/ Contrast the provisions of 26 USC 4744(a) which provide for the criminal prosecution of the recipient of marihuana. United States v. Covington, 282 F.Supp. 886 (SD Ohio).

In contrast to the statutes considered in Marchetti, Grosso, and Haynes, supra, 26 USC §4705(a) is administered so as to require registration and payment of the tax only by persons who may do so without violating local or Federal laws.3/

The applicable regulations require any person attempting to register to demonstrate that he is lawfully qualified to deal in narcotic drugs.4/ This limitation upon the registration and taxing provisions of Sections 4721 and 4722 of Title 26, United States Code, has been approved and indeed commanded by previous judicial construction of these Sections. United States v. Jin Fuey Moy, 241 US 394, 402 (1916); Martin v. United States, 20 F.2d 785 (6th Cir. 1927).

The appellant as a transferor of narcotic drugs is not required to produce any information by 26 USC §4705(a). To the extent that he might be considered subject to other provisions of the Act, he is not within the class of persons entitled to register or pay the special tax unless legally qualified under State and Federal law.

3/ The order forms required by §4705(a) are only available to persons who have registered and paid the special tax. 26 USC 4705(f).

4/ 26 CFR 151.23, 151.24.

By a lengthy and well reasoned opinion in the only case decided since those cited by appellant, the Second Circuit has recently sustained the instant statute against precisely the attack made by appellant here. Minor v. United States, 398 F.2d 511 (2nd Cir. 1968).

IV

CONCLUSION

We respectfully submit that the conviction should be affirmed.

Respectfully submitted,

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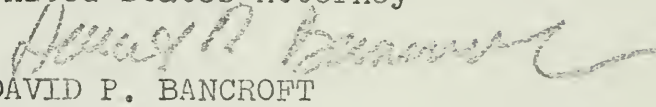
United States Attorney



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CERTIFICATE OF SERVICE BY MAIL

This is to certify that two copies of the foregoing Brief of the Appellee were this date forwarded by Certified Mail, Return Receipt Requested, to the following:

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C.A. 9th No. 22722
Criminal No. 41110 - DCND California